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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 333

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

—v.—

ALLIED AIR FREIGHT INTERNATIONAL CORP.,

Respondent.

BRIEF IN OPPOSITION

MILTON HOROWITZ
Attorney for Respondent
15 Park Row
New York, N. Y. 10038

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Respondent (hereinafter called "Allied") accepts Petitioner's (hereinafter called "Pan American") reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

Question Presented

Whether the Court of Appeals correctly determined that it was reversible error for the District Court to stay an air freight forwarder's antitrust action for treble damages, based on past misconduct implementing a contract, combination and conspiracy between an airline operator and another air freight forwarder which was terminated before the institution of the action, in favor of asserted primary jurisdiction in the Civil Aeronautics Board ("CAB")? Although all of the actors were air carriers within the

meaning of the Federal Aviation Act, neither the filing of the conspiratorial agreement for an immunizing order under §§412 and 414 of the Act nor unfair competitive practice proceedings under §411 of the Act had ever been instituted. The case involves discrimination in carriage by Pan American against Allied in preference of Pan American's co-conspirator, violative of §404(b) of the Act, for which a tort cause of action for single damages, based on the same facts, is also pleaded, but rates and routing practices are not involved.

Statutes Involved

Additionally to the texts of §§412 and 414 of the Federal Aviation Act of 1958; 72 Stat. 770, Title IV, §§412 and 414, quoted by Pan American in pages 2 and 3 of its Petition herein, the texts of §§404(b) and 411 of the same Act read as follows:

72 Stat. 760, Title IV, §404(b); 49 U. S. C. §1374(b):

DISCRIMINATION

Sec. 404(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

72 Stat. 769, Title IV, §411; 49 U. S. C. §1381:

METHODS OF COMPETITION

Sec. 411. The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Statement of the Case

The opinion of the Court of Appeals (*sub nom. Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441; Petition, pp. 1A-16A) gives an accurate capsule statement of the case and its post complaint history. Additionally, because the time elements figure so importantly, the chronology related in the complaint is as follows:

The conspiratorial agreement between Pan American and Add Airfreight Corp. ("Add") to squeeze Allied out of business was formulated during or shortly prior to August, 1962 and implemented by temporally well defined courses of misconduct, viz.,

1) An embargo by Pan American on carriage of Allied's goods in favor of Add's out of San Juan from August 10, 1962 through August 29, 1962 coupled with joint solicitation of Allied's customers by Pan American and Add effectively promising "next day" service if custom were switched to Add and threatening, effectively, that goods would not move if the customer stayed with Allied.

2) Following the embargo, a policy of harassment of Allied in Add's favor by Pan American's backlogging of Allied's freight.

3) Still another Pan American embargo on Allied's shipments, this time from New York during the three days of November 26th through 28th, 1962.

Paragraph 29 of the complaint contains the core allegations upon which the primary jurisdiction issue of this case, filed on January 8, 1964, turns:

> "Thereafter and in the Spring of 1963, said agreement, combination and conspiracy came to an end. Add, now the largest air freight forwarder in the New York-Puerto Rico trade, turned on its co-conspirator, the defendant, and took its business thus acquired to a competing air carrier." [1]

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[1] Paragraphs 30, 31, and 32 of the complaint went on to relate a unilateral course of conduct by Pan American, commencing on December 20, 1963 and continuing down to the commencement of the suit, in attempting to destroy Allied by destroying its credit, i.e., on the pretext of nonpayment of Allied's obligations to Pan American, threatening to and actually denying to Allied the use of Pan American's airway bills and credit facilities and revoking Allied's agency with Pan American.

In the decision of Pan American's motion to stay the action, the district court laid great stress on these allegations as providing a current nexus for CAB's primary jurisdiction attention (Petition, pp. 5B-7B). Allied, in applying for reargument, announced its intention to amend the complaint by deleting the allegations (Petition, p. 9A, footnote 3). On May 10, 1968, respondent so amended the complaint.

Pan American confines the scope of its Petition to seeking review only of the issue of primary jurisdiction. Accordingly, the "procedural underbrush" (Petition, p. 2A) falls away and the only instant concern is whether this Court ought to review a determination reversing as erroneous a district court stay of prosecution of a private antitrust action for damages based on past misconduct under a terminated, concededly unimmunized agreement, in favor of a primary jurisdiction in the CAB asserted for it by Pan American. Supporting its contention that this case merits review, Pan American contends that the holding below is in conflict with *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213 (1966) in that it misapplies the "arguably lawful" concept of *Carnation* to a radically differing immunizing statute.

Allied contends that the opinion below (Petition, pp. 1A-16A) is a determination free from error, and represents a narrow exception, hedged in by many qualifying conditions, to a general rule of primary jurisdiction.

Reasons for Denying the Writ

1. Pan American asserts a misconstruction by the court below of the "arguably lawful" criterion based on its failure "to note the clear difference between the wording of Section 412 of the Aviation Act and the wording of Section 15 of the Shipping Act * * *" (Petition, p. 8). This supposed misconstruction is asserted to have led the Court of Appeals into committing the basic error of denying to the CAB a power of retroactive validation of agreements not previously filed (Petition, pp. 8, 9).

The court was perfectly aware of the distinction between the Shipping Act outlawry of conduct implementing contracts prior to approval and the silence of the Aviation Act's §412 on the subject. Repeatedly, the court recognized the CAB's power of retroactive, validating approval, e.g.,

> "* * * if the complaint did not allege that the agreement had terminated, the Board would have primary jurisdiction and no antitrust suit could proceed until the Board issued an order approving or disapproving the agreement." (Petition, p. 9A.)

In commenting on *S. S. W., Inc.* v. *Air Transport Association*, 191 F. 2d 658 (D. C. Cir. 1951), *cert. denied*, 343 U. S. 955 (1952) and *Apgar Travel Agency* v. *International Air Transport Association*, 107 F. Supp. 706 (SDNY 1952), the court below said of *Apgar* (Petition, p. 10A):

> "* * * The district court followed the *S. S. W.* case and stayed the action pending an administrative determination of the validity of the agreement under the Civil Aeronautics Act, although the alleged agreement had never been filed with the Board. * * *"

What Pan American really challenges is not a failure to distinguish between differing immunizing statutes, but the distinction drawn by the court below between conduct under unfiled agreements beginning in the past but exerting a present impact and instances of conduct and agreements that have terminated without likelihood of repetition. That distinction is based on Aviation Act authority alone, without reference to the Shipping Act. Thus (Petition, p. 14A):

> "This is not a case where the past is prologue to present problems. See *Pan American World Airways, Inc.* v. *United States*, 371 U. S. at 310. The allegations of the complaint relate to actions that have been completed. Here one plaintiff is bankrupt, the other is insolvent and neither is in operation."

Pan American World Airways, Inc. v. *United States*, 371 U. S. 296 (1963) is replete with observations on the necessity for the presence of an element of currency amenable to the Board's remedial powers for the CAB to have a jurisdictional interest in a case, e.g., 371 U. S. at 303, footnote 7, referring to "reasonable probability" "at the time of suit"; the capacity of a transaction to be "undone" or "allowed to continue" (at 310); and authority in the CAB to deal with an "evil at hand" (at 312).

§414 of the Aviation Act, while not proscribing the implementation of unimmunized agreements as does the Shipping Act, plainly says that the purpose and scope of an immunizing order go as far "* * * as may be necessary *to enable* such person *to do* anything authorized, approved or required by such order." (Emphasis supplied.)

Although the court below has not expressly or necessarily ruled to the contrary, Pan American's assertion that the CAB "clearly has statutory power" to "validate an agreement that is no longer in effect" (Petition, p. 9) is more than questionable. Short of providing a gratuitous defense to a lawsuit, such an order would enable no one to do anything.

Nor was the Court of Appeals wrong in characterizing the stay of the lawsuit until Allied exhausted administrative "remedies" as a futile gesture. Manifestly money dam-

ages are the only meaningful remedy for a terminated wrong, a remedy the CAB is powerless to give. The very core of *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963) was a holding by this Court that the CAB had remedies to deal with the situation—a broad injunctive range inclusive of the power to order divestiture. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945). The distinction drawn by the court below between a demand for money damages as against, or in combination with, a prayer for injunctive relief, is far from the statement of an arbitrary rule, but rather represents a thoughtful balancing of the interrelationship among inherently applicable remedies, powers, and respective jurisdiction as between the CAB and the district courts.

Seen in the foregoing light, the court's appropriation of *Carnation's* (383 U. S. 213) "arguably lawful" terminology shrinks in scale to what the context plainly indicates it means, a threshold judicial inquiry as to whether there is a genuine issue of administrative immunization of the complained of activity. Thus (Petition, p. 13A):

> "The case before us is in all respects analogous to the *Carnation* case except that the alleged agreement concededly has not been passed upon by the CAB. Without CAB approval actions pursuant to an agreement are not immune from the antitrust laws. * * * * Since defendant's conduct is not arguably lawful under the Federal Aviation Act and plaintiff does not seek injunctive relief, we see no reason why the antitrust action should not proceed. * * * *"

More important is the accord between *Carnation Co.* v. *Pacific Westbound Conference, supra*, and the instant case in finding that an award of treble damages for past and

completed conduct, unimmunized by agency approval under the appropriate statute, works no conflict between court and agency, an avoidance of conflict constituting the prime objective of the doctrine of primary jurisdiction:

> "In deciding whether or not an alleged unfiled agreement no longer in force violated the antitrust laws, the district court would not be interfering with the Board's power to immunize this or similar agreements in the future under the criteria of §102 of the Federal Aviation Act, * * *" (Petition, p. 14A.)

Pan American has not demonstrated error in the opinion below.

2. The holding here represents an exceptional case of special circumstances combining to keep the case from referral to the CAB. Termination of antitrust misconduct, termination of the agreement, a failure to file the agreement, absence of a CAB order of immunizing approval, absence of an unfair competitive practice proceeding before the CAB in the matter, confinement of the suit to a demand for money damages, absence from the suit of a prayer for injunctive relief, non-involvement in the suit of rate, routing and rebate questions, and non-preclusion of the CAB from approving the same or similar agreements in future cases, have *all* been held necessary in making out a case against primary jurisdiction cession to the CAB. Far from posing a threat to the integrity of the regulatory scheme that will "have great impact upon the scheme of regulation of air carriers and the administration of the antitrust laws" as Pan American contends by way of conclusion (Petition, pp. 11, 12), this exception, by its narrowness, actually emphasizes the broad scope of the CAB's powers.

What the opinion does offer is relief, in the sorely tried private sector, against hit and run predation, an area where the application for stay or dismissal in favor of asserted primary jurisdiction is all too often a successful gambit in the tactics of attrition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Certiorari.

MILTON HOROWITZ
Attorney for Respondent
15 Park Row
New York, N. Y. 10038

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